91-664

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

No. _____

AVERY MILLS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW:

Whether the government must establish in a prosecution of a public official for extortion under color of official right that the defendant undertook some affirmative act such as a demand or other communication to induce the alleged victim of the extortion to part with his or her property.

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Petitioner Avery Mills respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on May 21, 1991.

OPINION BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is unpublished and is reproduced in the appendix. (App. at 1a-13a).

SUPREME COURT JURISDICTION

The conviction of the petitioner, Avery Mills, was affirmed by the United States Court of Appeals for the Sixth Circuit on May 21, 1991. Mr. Mills timely filed a petition for rehearing and suggestion for rehearing en banc which was denied on July 19, 1991. (App. at 14a-15a).

This Court's jurisdiction to review the decision of the United States Court of Appeals for the Sixth Circuit is conferred by 28 U.S.C. § 1254(1).

STATUTE INVOLVED IN THIS CASE

18 U.S.C. § 1951, Interference with **commerce** by threats of violence:

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section --

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his

person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45.

STATEMENT OF THE CASE

Avery Mills was prosecuted and subsequently convicted for obstruction and attempted obstruction of interstate commerce by extortion in violation of the Hobbs Act, 18 U.S.C. Section 1951(a). At the time of his indictment, Mr. Mills was the sheriff of Blount County, Tennessee. Mr. Mills' prosecution was predicated upon monies that Mr. Mills received from representatives of two bail bonding companies that did business in Blount County. Specifically, Mr. Mills received monies from Jackson Sanford, part owner of East Tennessee Bonding Company, and Quentin Stiles, part owner of Blount County Bonding Company.

The superseding indictment upon which Mr. Mills was tried alleged ten counts of obstruction and attempted obstruction of interstate commerce in that

he obtained or attempted to obtain "by the wrongful use and fear of economic loss and under color of official right, money" from East Tennessee Bonding Company as a result of ten transactions wherein Jackson Sanford allegedly paid monies to Mr. Mills.

The superseding indictment also included eight counts of attempting to obstruct interstate commerce in that Mr. Mills "did unlawfully attempt to obtain by the wrongful use and fear of economic loss and under color of official right, money" from Blount County Bonding Company as a result of eight transactions wherein Mr. Stiles made payments of money to Avery Mills at the direction of the FBI and with money supplied by the FBI.

The following facts can be distilled from the testimony of the Government's two principal witnesses at trial, Mr. Sanford and Mr. Stiles.

1. Jack Sanford

(a) Mr. Sanford set up the meeting at which he initially gave money to Mr. Mills without any request by Mr. Mills or anyone else. Mr. Sanford stated that he felt that this payment as well as all subsequent payments were merely post-election campaign contributions. Mr. Sanford testified he thought it would be a good idea to give Mr. Mills a contribution because he had not given Mr. Mills anything prior to the election and had not supported Mr. Mills in the election.

(b) Neither at the initial meeting nor at any of the subsequent meetings did Mr. Mills make any direct threats to harm Mr. Sanford's business. Mr. Mills never threatened to "freeze out" East Tennessee Bonding Company from doing business in Blount County.

(c) At no time did Mr. Mills make

any comments suggesting that he would do anything specific to aid East Tennessee Bonding.

(d) Mr. Mills had done nothing to harass Mr. Sanford or his agents.

(e) Mr. Sanford could not identify any benefit that East Tennessee Bonding received as a result of making payments to Mr. Mills.

(f) When Mr. Sanford informed Mr. Mills that he would not make any further payments, Mr. Mills did not threaten to hurt Mr. Sanford's business in any way. The month after Mr. Sanford stopped making any payments to Mr. Mills, East Tennessee Bonding Company had the best month it had had in Blount County in years.

2. Quentin Stiles

(a) At the instigation of the FBI, Mr. Stiles initiated the meeting at which he first gave money provided by the FBI to Mr. Mills. This meeting occurred in April, 1987.[1]

(b) During this first meeting recorded by the FBI, Mr. Mills specifically asked Mr. Stiles if he understood that he did not have to give him any money. Mr. Stiles acknowledged that he understood and then continued to press the money upon Mr. Mills. Mr. Mills again told Mr. Stiles that Mr. Stiles did not have to give him

[1]Mr. Stiles claimed at trial that he had an earlier meeting with Mr. Mills in January of 1987 which prompted him to contact the Federal Bureau of Investigation. Mr. Stiles claimed that during his January 1987 meeting with Mr. Mills, Mr. Mills made the statement, ". . . it's always been customary to take care of the Sheriff." Mr. Stiles alleged that at the time Mr. Mills made this comment, he rubbed his fingers against his thumb.

any money at a subsequent meeting.

(c) During subsequent recorded meetings, Mr. Stiles attempted to solicit a statement from Mr. Mills that he would do something to benefit Blount County Bonding, however his attempts to induce such a statement failed. Mr. Mills made no promises, coercive statements and issued no threats, ever.

(d) As a result of this failure, the FBI terminated its investigation of Mr. Mills for some months. During this period, Mr. Stiles made no payments to Mr. Mills.[2]

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[2]From the period of December 10, 1987, until August 24, 1988, Mr. Stiles did not meet with Mr. Mills or make any payments to him. There were two meetings in September of 1988 between Mr. Mills and Mr. Stiles but no money was exchanged. Mr. Stiles again attempted to get Mr. Mills to state a figure or a percentage but Mr. Mills made no promises, coercive statements, or threats. Following these meetings in September of 1988, there was another discontinuation of any activity in the investigation. It was not until February of 1989, that Mr. Stiles again initiated contact with Sheriff Mills. Mr. Stiles approached the FBI agents in

(e) During the period after Mr. Stiles stopped making payments to Mr. Mills, Blount County Bonding enjoyed some of the best months in the company's history.

It is evident from the testimony of Mr. Sanford and Mr. Stiles that Mr. Mills did nothing to "induce" Mr. Sanford or Mr. Stiles to give him money, either through "actual or threatened force, violence, or fear" or "under color of official right."

At trial, Mr. Mills requested the following jury instruction regarding the

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February to request that they "get back into paying business" because he was angry with Mr. Mills over an incident that occurred at the Blount County Jail between Mr. Stiles' partner, William Johnson, and George Eaton, of the East Tennessee Bonding Company.

Stiles made payments to Mills in February, March and May of 1989. Mr. Mills made no promises, threats, or communicated any inducement to Mr. Stiles at any of his meetings with him.

element of "inducement" in an "under color of official right" prosecution as these terms are used in 18 U.S.C. Section 1951:

> I have previously instructed you that an element of the crime of extortion is that the defendant 'induced' the respective bonding companies to part with property. In this regard, I further instruct you that the 'inducement' must either be in the form of a 'demand' or the communication of a custom or expectation, communicated by the nature of the defendant's prior conduct of office.

This instruction was based on en banc decisions from the Ninth and Second Circuits which have held that the element of inducement must be proven beyond a reasonable doubt to constitute the offense of extortion "under color of official

right."[3]

The district court denied Mr. Mills' requested instruction and instead charged the jury that:

> Where the extortion is alleged to have been committed under 'color of official right,' the government is not required to prove any overt inducement or solicitation of payment by the public official.

(App. at 22a-23a).

The district court's instruction was based on United States v. Butler, 618 F.2d 411 (6th Cir. 1980), a Sixth Circuit Court of Appeals decision which affirmed a conviction under 18 U.S.C. Section 1951 even though the district court had not given an instruction on the inducement

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[3]See, e.g., United States v. Aguon, 851 F.2d 1158, 1162-67 (9th Cir. 1989) (en banc); United States v. O'Grady, 742 F.2d 682, 687 (2d Cir. 1984) (en banc). The language of this instruction was taken directly from the text of Aguon.

element.

Mr. Mills was convicted on all counts and appealed his convictions. On appeal in the Sixth Circuit, Mr. Mills relied upon Aguon and O'Grady and pointed out that United States v. Jenkins, 902 F.2d 459 (6th Cir. 1990), had decided in his favor the issue of whether "inducement" is a required element under a Hobbs Act extortion charge when property is alleged to have been taken "under color of official right."[4]

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[4]The Jenkins Court, in its analysis of the Butler opinion stated:

> Despite the Government's concession, one reads Butler and all the cases cited therein in vain to find any analysis or authority for the conclusion that inducement is not an element of the form of extortion charged against Judge Jenkins in this case.

United States v. Jenkins, 902 F.2d

Significantly, the Jenkins Court cited both Aguon and O'Grady as representing "the clear weight of federal authority" on this issue. Jenkins, 902 F.2d at 467.

Inexplicably, the Sixth Circuit panel opinion relied on Butler and disposed of the inducement issue by summarily stating:

> The appellant's interpretation of United States v. Jenkins, 902 F.2d 459 (6th Cir. 1990), and Butler is incorrect. The great weight of authority supports the district court's instruction defining 'inducement' as it applies within the context of this case. Accordingly, this court concludes that the district court applied

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459, 467 (6th Cir. 1990) (the allegation against Jenkins was that he had requested and received money, etc., in exchange for the dismissal and clearing of traffic violations and misdemeanor charges pending in a court over which he presided).

Butler correctly.[5]

United States v. Mills, No. 90-5793, slip.op. at 5 (6th Cir. May 21, 1991) (App. at 7a).

The Court did not state how Mr. Mills' interpretation of these cases was incorrect, nor did it shed any light on how Butler and Jenkins could suddenly become compatible on the inducement issue. The

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[5]The Sixth Circuit panel opinion cited the following authority for its conclusion: United States v. Evans, 910 F.2d 790, 796 (11th Cir. 1990); United States v. Westmoreland, 841 F.2d 572, 581 (5th Cir.), cert. denied, 109 S.Ct. 62 (1988); United States v. Paschall, 772 F.2d 68, 73 (4th Cir. 1985), cert. denied, 475 U.S. 1119 (1986); United States v. Jannotti, 673 F.2d 578, 594-96 (3d Cir.) (en banc), cert. denied, 457 U.S. 1106 (1982); United States v. French, 628 F.2d 1069, 1074 (8th Cir.), cert. denied, 449 U.S. 956 (1980); United States v. Hall, 536 F.2d 313, 320-21 (10th Cir.), cert. denied, 429 U.S. 919 (1976); United States v. Hathaway, 534 F.2d 386, 393-94 (1st Cir. 1976); United States v. Braasch, 505 F.2d 139, 151 (7th Cir. 1974). cert. denied, 421 U.S. 910 (1975). Contra, United States v. Aguon, 851 F.2d 1158, 1162-67 (9th Cir. 1989) (en banc); United States v. O'Grady, 742 F.2d 682, 687 (2d Cir. 1984) (en banc).

Court also failed to explain why Butler rather than Jenkins should be applied in this case.

The panel opinion went on to state what is presumably the Sixth Circuit's most recent pronouncement of the law on this issue.

> If the public official knows the motivation of the victim focuses on the public official's office and money is obtained by the public official which was not lawfully due in owing him or the office he represented, that is sufficient to satisfy the requirements of the law of extortion under color of official right.

United States v. Mills, No. 90-5793 slip.op. at 5-6 (6th Cir. May 21, 1991) (quoting United States v. Hedman, 630 F.2d 1184, 1194, n.4 (7th Cir. 1980, cert denied, 458 U.S. 965 (1981)) (App. at 12a).

Mr. Mills unsuccessfully sought rehearing before the United States Court of Appeals for the Sixth Circuit as well as a

suggestion for rehearing en banc by pointing out the clear conflict within the Sixth Circuit between the Butler and Jenkins decisions on the issue of inducement. The Sixth Circuit denied these petitions without comment. (App. at 14a-15a).

The Sixth Circuit's apparent adoption of the view that all that is necessary in a Hobbs Act prosecution of a public official alleging extortion under color of official right is that the public official know that the motivation of the victim focuses on the public official's office reads the inducement element out of 18 U.S.C. § 1951. This position is in direct conflict with en banc decisions from the Second and Ninth Circuit Courts of Appeal.

For the reasons that follow, Mr. Mills respectfully requests this Court to grant certiorari in the instant case and ultimately resolve this conflict in favor of a reading of the Hobbs Act that comports with reasonable textual analysis as well as its legislative history.

REASON FOR GRANTING THE WRIT

THE CONFLICT BETWEEN THE CIRCUIT COURTS OF APPEAL ON THE ELEMENT OF INDUCEMENT IN AN EXTORTION UNDER COLOR OF OFFICIAL RIGHT PROSECUTION THAT THIS COURT HAS DECIDED TO RESOLVE IN EVANS V. UNITED STATES, NO. 90-6105 EXISTS HERE AND THIS CASE SHOULD BE DECIDED WITH EVANS AS A COMPANION CASE.

United States v. Mills, No. 90-5793 (6th Cir. May 21, 1991), is in direct conflict with en banc decisions of the Ninth Circuit in United States v. Aguon, 851 F.2d 1158 (9th Cir. 1988) (en banc) and the Second Circuit in United States v. O'Grady, 742 F.2d 682 (2d Cir. 1984) (en banc).

In United States v. Mills, the Sixth Circuit has adopted as its position that inducement is not an element that need be proved by the Government in the prosecution of a public official for extortion under color of official right.

The Sixth Circuit in Mills quoted United States v. Butler, 618 F.2d 411, 419 (6th Cir. 1980) which states as follows:

> [T]he crux of the statutory requirement of "under color of official right" is the wrongful use of one's office to obtain payments. . . . 'It matters not whether the public official induces payments to perform his duties or not to perform his duties, or even, . . . to perform or not to perform acts unrelated to his duties which can only be undertaken because of his official position. So long as the motivation for the payment focuses on the recipient's office, the conduct falls within the ambit of 18 U.S.C. § 1951.' [United States v. Braasch, 505 F.2d 139 (7th Cir. 1974), cert.denied, 421 U.S. 910 (1975).].

United States v. Mills, No. 90-5793, slip op. at 5, (6th Cir. May 21, 1991) (emphasis supplied)(App. at 10a-11a).

The Ninth Circuit, however, held that proof that a defendant "personally induced" an improper payment is an essential element in the crime of extortion under color of official right and mere acceptance of a payment to perform a public act is not extortion under the Hobbs Act. United States v. Aguon, 851 F.2d 1158, 1167 (9th Cir. 1988) (en banc).

The Ninth Circuit held that "inducement" can be in the overt form of a "demand" or in a more subtle form such as "custom" or "expectation" such as might have been communicated by the nature of the defendant's prior conduct of his office. Aguon, 851 F.2d at 1166.

Likewise, in the Second Circuit, a public official who accepts an unsolicited benefit given because of the public office is not chargeable with extortion under color of official right.

United States v. O'Grady, 742 F.2d 682 (2d Cir. 1984)(en banc).

In the Second Circuit, in addition to proof that a public official received benefits, there must also be proof that the public official did something, under color of public office, to cause the giving of benefits. O'Grady, 742 F.2d at 687.

Accordingly, the Sixth Circuit's decision on the inducement issue is in direct conflict with the Second and Ninth Circuit's position.

This Court granted John H. Evans, Jr.'s petition for a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit on June 3, 1991, to resolve the precise issue Mr. Mills presents in the instant petition. Evans v. United States, No. 90-6105, cert granted, June 3, 1991. This Court's resolution of

the inducement issue is as important to Mr. Mills as it is to Mr. Evans. For the reasons stated herein Mr. Mills respectfully asserts that this Court should grant his petition for a writ of certiorari and schedule the two cases together for briefing and argument.

A comparison of the Evans case with the Mills case illustrates that they are not factually identical and the Sixth Circuit's interpretation of the Hobbs Act requires an even less stringent level of proof in an extortion under color of official right prosecution than does the Eleventh Circuit.

Both the Evans and Mills cases involve unsolicited payments to elected officials. In Evans, the payments were made by an undercover FBI agent to a DeKalb County Commissioner. The agent requested and received Evans agreement to assist the

agent (posing as a land developer) in setting up meetings with other county commissioners who approved zoning requests. The Government's theory of the case was that the payment was made to the Commissioner in return for this agreement. United States v. Evans, 910 F.2d 790, 792-94 (11th Cir. 1990).

In Mills, the unsolicited payments were made to a county sheriff by persons in the bail bonding business. The Government's theory was that such payments were made in order to ensure that the bail bonding businesses were allowed to operate without hinderance or interference by the Sheriff or upon the implied promise that the Sheriff would steer bonds to the respective companies.

However, unlike Evans, the record is absent any proof of an agreement by Mr. Mills to do anything with respect to their

bail bonding businesses, or any threat by him to the operation of their businesses in Blount County. See, supra, at 7-12.

Thus, Mills and Evans are factually similar (both involve unsolicited payments to elected officials) but also factually different (Evans agreed to help the land developer and did -- Mills did not agree to do anything for the bondsmen and did nothing).

There are also differences in the manner in which these two decisions phrase the elements of an extortion under color of official right prosecution which may enable this Court to outline more specifically the precise elements of proof required in such a prosecution.

In the Eleventh Circuit, inducement is required to be proved for conviction of the crime of extortion under color of official right. United States v.

Evans, 910 F.2d 790, 795 (11th Cir. 1990). However, under Evans, the element of inducement is automatically supplied by the power of public office.

> [T]he requirement of inducement is automatically satisfied by the power connected with the public office. Therefore, once the defendant [sic] [prosecution] has shown that a public official has accepted money in return for a requested exercise of official power, no additional inducement need be shown. 'The coercive nature of the office provides all the inducement necessary.'

Evans, 910 F.2d at 796-797 (citations omitted)(error in Federal Reporter publication).

The Eleventh Circuit thus requires the Government to show, in addition to the acceptance of money, that the "victim" of the extortion requested the defendant to exercise his power before the

payment was accepted.

In contrast, the Sixth Circuit takes the position that in an extortion under color of official right prosecution, inducement is not an element at all. Mills, No. 90-5793 (6th Cir. May 21, 1991) slip op. at 5. The Sixth Circuit does not even require a request to the defendant by the victim to exercise or not exercise the power of his or her office.

The Sixth Circuit does not undergo the academic exercise of equating the power connected with the public office with the element of inducement as does the Eleventh Circuit. The Sixth Circuit states that it is irrelevant whether or not the payments were induced so long as the public official knows that the "motivation of the victim focuses on the public official's office." United States v. Mills, No. 90-5793, slip op. at 5, (6th Cir. May 21,

1991) (App. at 11a).

Accordingly, under the Sixth Circuit's position, it is not necessary in order to prove extortion under color of official right that the "victim" or the public official do anything other than the "victim" pay money and the defendant receive money. That is all the Sixth Circuit requires.

The Sixth Circuit's interpretation of the Hobbs Act renders it extremely broad. The coverage of the statute has been curbed somewhat by the imposition of the requirement that the Government prove a quid pro quo in a Hobbs Act prosecution of an elected official based upon his or her receipt of a campaign contribution. McCormick v. United States, ____ U.S. ____, 111 S.Ct.R. 1807 (1991).

However, in cases of non-elected officials or cases involving gifts or

payments other than campaign contributions to elected officials, the harsh punishment of the Hobbs Act can be visited in the Sixth Circuit on a broad range of conduct wherein things of value are given to a public official without solicitation under circumstances that establish, at worst, bribery, or at best, no crime at all. See United States v. Aguon, 851 F.2d 1158, 1163-1168 (9th Cir. 1988).[6]

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[6]There are very persuasive reasons to interpret the Hobbs Act to require proof of an affirmative act of inducement in some form by an elected official in an extortion under color of official right prosecution. See United States v. O'Grady, 742 F.2d 682 (2d Cir. 1984) (en banc); United States v. Aguon, 851 F.2d 1158 (9th Cir. 1988) (en banc); Ruff, Charles F.C., Federal Prosecution of Local Corruption: A Case Study in the Making of Law Enforcement Policy, 65 GEO. L.J. 1171 (1977). By granting certiorari in Evans v. United States, No. 90-6105, cert granted, June 3, 1991, this court has indicated its interest in these arguments and in fact has previously acknowledged its familiarity with many of these arguments. McCormick v. United States, _____ U.S. _____, 111 S.Ct.R. 1807 (1991). Accordingly, this petition will not repeat that with which

Thus, the Evans and Mills provide factually similar (but not identical) cases that reach the same results based upon different reasoning. Accordingly, the Sixth and Eleventh Circuit's decisions present good companions upon which this Court can resolve the conflict between the Sixth and Eleventh Circuit's interpretations of 18 U.S.C. § 1951 and the interpretations of that statute by the Second and Ninth Circuit.

CONCLUSION

This Court will unquestionably address the issue presented in the instant petition in Evans v. United States, No. 90-6105, a case this Court granted certiorari upon on June 3, 1991. This Court will therefore resolve the conflict among the circuits on this important issue involving

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this Court is already acquainted.

the liability of public officials under the Hobbs Act and define precisely what extortion under color-of official right means in the context of that often used statute. The factual similarity and factual differences between the Mills and Evans cases combined with the distinctions in legal reasoning presented by the opinions Petitioners Mills and Evans seek to review from the Sixth and Eleventh Circuits make a persuasive case for this Court's review of them together as companion cases. Accordingly, petitioner Mills respectfully requests this Court to grant his petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit and that the case be set down for briefing and argument with Evans v. United States, No. 90-6105.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 90-5793

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

AVERY MILLS,

Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Tennessee

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Decided and Filed May 21, 1991

Before MARTIN, KRUPANSKY, and NORRIS, Circuit Judges

PER CURIAM. Defendant-appellant Avery Mills has appealed his conviction pursuant to a jury verdict for obstruction and attempted obstruction of commerce by extortion in violation of the Hobbs Act, 18 U.S.C. § 1951(a).

Avery Mills was elected Sheriff of Blount County, Tennessee in August of 1986, and assumed the duties of that office on September 1 of that year. He continued to hold that office until after his arrest in this case. While the appellant was sheriff, five bonding companies were authorized to write bail bonds in the courts of Blount County. These included East Tennessee Bonding Company (East) of which Jackson Sanford was president and 40% owner, and Blount County Bonding Company (BCB), owned by partners Quenton Stiles and William Johnson. Both companies' employees regularly conducted business across state lines using interstate communications facilities and federally regulated financial institutions. The eighteen-count superseding indictment alleged that the defendant affected and attempted to affect

interstate commerce in obtaining money from these two bonding companies.

After the appellant became sheriff, Sanford was approached by the appellant and they agreed to meet at a restaurant. Since Sanford had supported the appellant's opponent in the sheriff's election, he offered a postelection campaign contribution of $1500 to the appellant. Although Sanford brought an employee of East with him, the appellant made it clear that he desired to converse in private and not in the presence of Sanford's employee. Sanford dismissed his employee.

The appellant accepted Sanford's tendered $1500 and advised him that if he intended to write bonds in Blount County and if he wished to be considered the favored bonding company, Sanford would have to pay the appellant $1000 a month.

Sanford countered with $500 per month, but the appellant refused the offer. They settled on $750 a month payable quarterly. Sanford testified: "I knew he couldn't help me, but I didn't want to be hurt . . . I knew he could hurt me. I had been hurt before." He explained that this company had been "froze out" by a previous sheriff until he made the payoffs demanded. Sanford testified that without Blount County business, East probably "couldn't survive," since it transacted a major part of its business in the area.

Sanford testified that he was not desirous to "give up the profit" of his business, but felt it was necessary to pay "protection money" so his business would get a "fair shake." He made the following payments from an account at First Tennessee Bank: $1500 in January 1987, and $2250 on

eight other occasions through January of 1989 for a total of $19,500.

The first two payments were made at the restaurant; the rest of the payments were made at a closed service station. The appellant repeatedly cautioned Sanford not to disclose the payments to anyone or they would "go down" together. The payments were presented in envelopes which Sanford usually slipped under a folded newspaper and placed on the seat of his automobile.

After a "religious experience," Sanford decided to stop the payments in March 1989. The appellant told Sanford that he was crazy. "You'll be back soon, you'll come back . . . you can see me anytime you want to."

On the day before his arrest, at a meeting arranged by the appellant, he inquired of Sanford if he had "been talking to anybody" and advised Sanford that he

would be in the same trouble as the appellant if he revealed their arrangement.

The appellant also received payments from Stiles of BCB. Stiles was personally acquainted with the appellant and had supported him in his campaign for sheriff making pre-election campaign contributions. In January 1987, Stiles briefly met the appellant in the appellant's office, and was directed to another building where the two could be alone and where the appellant commented that it had always been "customary to take care of the sheriff." As he said this, the appellant was rubbing his fingers and thumb together. Stiles wanted no part of a payoff arrangement, but was concerned that he would lose his business if he did not pay. After considering the situation, Stiles went to the authorities.

Beginning in April, 1987, Stiles, in cooperation with the FBI, made monthly payments to the appellant through August 1987, and once again in February 1989, using currency furnished by the FBI. Tape recordings of the meetings indicated that the appellant frequently commented about BCB's successful business and about how the appellant had "done right" by Stiles and vice versa. The appellant also commented that some bondsmen, who had given the appellant "trouble," were not doing well in the county.

On appeal, the appellant's primary objections are to instructions given the jury wherein the district court defined the necessary elements of the offense with which the appellant was charged.

The applicable statute provides, in pertinent part:

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by . . . extortion or attempts or conspires to do so, . . . shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section --

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(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any territory or Possession of the United States; all commerce between any point in a State, territory, Possession, or the District of Columbia, and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

18 U.S.C. § 1951(a),(b)(2)(3).

The appellant charged that the district court's instruction (1) failed to include "inducement" as an element of extortion "under color of official right," (2) failed to properly define fear as an element of "wrongful use of fear," (3) failed to properly define "affect in interstate commerce," and (4) failed to impart to the jury that the victims must reasonable have believed that the appellant had the ability, arising from his official authority, to harm or help the victim. The appellant also asserted that the district court erroneously failed to instruct the jury on the appellant's theory of defense and that there was insufficient evidence to support the jury verdict.

Jury instructions are reviewed in their entirety to determine whether they adequately inform the jury of relevant considerations and provide a basis in law

for reaching a decision. *Kitchen v. Chippewa Valley Schools*, 825 F.2d 1004, 1010-11 (6th Cir. 1987). A judgment can be reversed if the instructions, viewed as a whole, were confusing, misleading, or prejudicial. *Id.* at 1011. A proposed jury instruction that is prejudicially worded and which would have been of no more practical value to the jury than the instruction actually given by the trial court may be properly rejected by the trial court. *United States v. Hessling*, 845 F.2d 617, 621 (6th Cir. 1988). The standard for reviewing the propriety of a jury instruction is an abuse of discretion standard. *United States v. Butler*, 618 F.2d 411, 419 (6th Cir. 1980).

This Court has previously held the following:

> [T]he crux of the statutory requirement of "under color of official right" is the wrongful use of one's office to obtain payments. . . . "It matters not

> whether the public official induces payments to perform his duties or not to perform his duties, or even, . . . to perform or not to perform acts unrelated to his duties which can only be undertaken because of his official position. So long as the motivation for the payment focuses on the recipient's office, the conduct falls within the ambit of 18 U.S.C. § 1951." [*United States v. Braasch*, 505 F.2d 139 (7th Cir. 1974), *cert denied*, 421 U.S. 910 (1975).]

Butler, 618 F.2d at 418, 420.

The appellant's interpretation of *United States v. Jenkins*, 902 F.2d 459 (6th Cir. 1990), and *Butler* is incorrect. The great weight of authority supports the district court's instruction defining "inducement" as it applies within the context of this case. Accordingly, this court concludes that the district court applied *Butler* correctly. *See e.g., United States v. Evans*, 910 F.2d 790, 796 (11th Cir. 1990); *United States v. Westmoreland*, 841 F.2d 572, 581 (5th Cir.), *cert denied*, 109 S.Ct. 62 (1988); *United States v.*

Paschall, 772 F.2d 68, 73 (4th Cir. 1985), *cert denied*, 475 U.S. 1119 (1986); *United States v. Jannotti*, 673 F.2d 578, 594-96 (3d Cir.) (en banc), *cert. denied*, 457 U.S. 1106 (1982); *United States v. French 628 F.2d 1069, 1074 (8th Cir.)*, cert. denied, *449 U.S. 956 (1980)*; United States v. Hall, *536 F.2d 313, 320-21 (10th Cir.)*, cert. denied, 429 U.S. 919 1976); *United States v. Hathaway*, 534 F.2d 386, 393-94 (1st Cir. 1976); *Braasch*, 505 F.2d at 151. *Contra*, *United States v. Aguon*, 851 F.2d 1158, 1162-67 (9th Cir. 1989) (en banc); *United States v. O'Grady*, 742 F.2d 682, 687 (2d Cir. 1984) (en banc).

> If the public official knows the motivation of the victim focuses on the public official's office and money is obtained by the public official which was not lawfully due and owing him or the office he represented, that is sufficient to satisfy the requirements of the law of extortion under color of official right.

United States v. Hedman, 630 F.2d 1184, 1194 n.4 (7th Cir. 1980), *cert. denied*, 458 U.S. 965 (1981).

This court finds no merit in the appellant's remaining assignments of error. Accordingly, the judgment of the district court is AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 90-5793

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

AVERY MILLS,

Defendant-Appellant.

ORDER

Filed July 19, 1991

Before MARTIN, KRUPANSKY, and NORRIS, Circuit Judges

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote

on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

_____

LEONARD GREEN, CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE

No. 3-89-45

UNITED STATES OF AMERICA

v.

AVERY MILLS

THE COURT'S INSTRUCTIONS TO THE JURY, FEBRUARY 12, 1990

Now, as indicated earlier, Avery Mills is charged with nine counts of extortion and nine counts of attempted extortion of payments of money from two bail bonding companies. Now, each count involves a separate date on which the extortion or attempted extortion is alleged to have occurred. Now, each count charges a violation of a federal law called the Hobbs Act, which is found in Title 18 of the United States Code, Section 1951.

Now, this law provides in pertinent part as follows:

> Whoever in any way or degree obstructs, delays or affects commerce or the movement of any article or commodity in commerce by extortion or attempts or conspires to do so shall be guilty of a crime against the United States.

Now, the statute also defines the word, words extortion and commerce in the following fashion:

Now, the term extortion means the obtaining of property from another with his consent induced by wrongful use of actual or threatened force, violence or fear or under color of official right.

Now, the term commerce means:

> Any commerce between any point in the state, territory, or possession of the United States or the District of Columbia and any point outside

> thereof; all commerce between points within the same state through any place outside such state; and all other commerce over which the United States has jurisdiction.

Now, in order to establish the offense charged in Counts I through IX of the indictment, the government must prove two essential elements as follows:

One, that the defendant knowingly and willfully obtained property from another by means of extortion as defined in these instructions; and

Two, that the defendant did so in a manner which would delay, obstruct or affect interstate commerce in some way or to some degree.

Now, the government is required to establish each of these elements beyond a reasonable doubt. The law never imposes on the defendant in a criminal case the

burden of introducing any evidence or calling any witness.

Now, interstate commerce may be affected within the meaning of these instructions, by an increase in the cost of doing business in interstate commerce, or by the depletion of assets of a business affecting interstate commerce, or by the reduction of the profits from interstate business. It is not necessary to show an actual interruption or delay of business.

Now, the bonding companies involved in this case may be considered to do business in interstate commerce if their employees travel outside the State of Tennessee in order to do bonding business or if the companies regularly used facilities of interstate commerce such as telephones, telephone pagers and banking institutions.

In order to satisfy the second element of the offense, the government must prove that there is a realistic probability that one of the natural consequences of the defendant's act or acts of extortion must be the obstruction, delay or some other kinds of affect, or some other kind of affect on interstate commerce.

Now, it's not necessary for the government to show that the defendant intended to specifically obstruct, delay or affect interstate commerce. All that is necessary as to this issue is that the government's evidence prove that the defendant intended to commit an act prescribed by the statute, the natural consequences of which would be to obstruct, delay or affect commerce.

Now, as indicated earlier, extortion is the obtaining of property, such as money, from another, with his

consent, either under color of official right, or induced by the wrongful use of fear. Now, the term property includes money.

Now, the term fear means a state of anxious concern, alarm or apprehension of harm, and it includes fear of economic loss or damage as well as fear of physical violence. The loss feared may be a direct loss of money or, alternatively, the fear of some barrier to the victim's ability to compete in the marketplace in the future.

Extortion by the wrongful use of fear means the person making the payments was induced by the defendant to part with property out of fear. The defendant himself may have caused the fear by making threats, either express or implied. The government does not have to prove that the defendant actually caused the fear, but it must prove, beyond a reasonable doubt, that

the defendant intentionally exploited or preyed upon the reasonable fears of the person making the payments regardless of whether he was responsible for creating those fears and despite the absence of any direct threats.

Now, extortion under color of official right means the obtaining of property, including money, by a public official, the misuse of his office, when the property obtained was not lawfully due and owing to him or to his office. Thus, extortion under color of official right does not require proof of specific acts by the public official demonstration force, threats, intimidation or the use of fear so long as the person making payment consented to do because of the office or position held by the official.

Now, where the extortion is alleged to have been committed under color

of official right, the government is not required to prove any overt inducement or solicitation of payment by the public official.

In order to prove extortion under color of official right, rather than by wrongful use of fear, the government must prove, beyond a reasonable doubt, that payments were made to the public official with the reasonable expectation that the public official would extent some benefit or refrain from some harmful action, harmful action. It need not prove that benefits were actually extended.

Additionally, the government must prove that the person making the payment held, and the defendant exploited, a reasonable belief and expectation that because od the defendant's public office, he had the ability to extent the benefit sought or prevent the harm feared.

Now, there is no extortion unless the public official acts with specific intent to violate the law. Now, specific intents means more than the general intent to commit an act. To establish specific intent, the government must prove that the defendant knowingly did an act which the law forbids, purposely intending to violate the law. Now, specific intent can be determined from all the facts and circumstances surrounding the case.

Now, the word knowingly, as that term has been used from time to time in these instructions, means that the act was done voluntarily and intentionally and not because of mistake or accident or other innocent reasons.

The word willfully, as that term has been used from time to time in the se instructions, means that the act was committed voluntarily and purposely and

with the specific intent to do something the law forbids; that is to say an intentional violation of a known legal duty. Now, Mr. Mills' conduct was not willful if he acted for a purpose other than to intentionally do something which the law forbids.

Now, you will note the indictment charges that the offenses named were committed on or about certain dates. The proof need not establish with certainty the exact date of any alleged offense. It is sufficient if the evidence in the case establishes beyond a reasonable doubt that the offenses were committed on a date reasonably near the date alleged.

Now, Counts X through XVIII of the indictment charge that on or about the dates alleged that the defendant, Avery Mills, knowingly and unlawfully attempted to commit extortion affecting interstate

commerce in violation of Title 18, united States Code, Section 1951(a).

Now, as explained in the instructions for Count I, Counts I through VIII, a person who affects interstate commerce by inducing another to part with property by the wrongful use of fear or a public official who obtains property under color of official right, which is not due to the public official or the public office, is guilty of the crime of extortion. Likewise, it is a crime to attempt to extort money by these means.

Now, an attempt -- to attempt an offense means willfully to take some substantial step in an effort to bring about or accomplish something the law forbids to be done.

The crime of attempt concerns actions which fall short of achieving some underlying crime a person intends to

commit. Thus, criminal attempt only arises when a person is actually unsuccessful in committing another intended crime. It does not matter why the person charged with criminal attempt was unable to complete the underlying intended crime.

Now, in order to find the defendant guilty of attempt, as charged in Counts X through XVIII of the indictment, you must find that the government has proved beyond a reasonable doubt the following things:

One, that the defendant intended to engage in criminal conduct;

Two, that the defendant performed at least one overt act which constituted a substantial step toward the commission of a substantive offense of extortion; and the act was performed with the intent and purpose to commit the offense of extortion; and

Three, that the actions of the defendant had the realistic potential to affect interstate commerce.

Hence, you must find that the government has shown that the conduct which is to constitute an attempt, including the overt act constituting a substantial step toward the commission of the substantive offense of extortion, must have been committed by the defendant with the intent and purpose of inducing another to part with property by the wrongful use of fear or obtaining property under color of official right as defined within these instructions.

(2)

No. 91-664

In the Supreme Court of the United States

OCTOBER TERM, 1991

AVERY MILLS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

KENNETH W. STARR
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QUESTION PRESENTED

Whether, in a Hobbs Act prosecution of a public official for extortion under color of official right, the government must prove that the defendant induced the victim to make the unlawful payment by means of an explicit or implicit demand.

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OCTOBER TERM, 1991

No. 91-664

AVERY MILLS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is unpublished, but the judgment is noted at 933 F.2d 1010 (Table).

JURISDICTION

The judgment of the court of appeals was entered on May 21, 1991. A petition for rehearing was denied on July 19, 1991. The petition for a writ of certiorari was filed on October 17, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Tennessee, petitioner was convicted on 18 counts of extortion or

attempted extortion under color of official right, in violation of the Hobbs Act, 18 U.S.C. 1951(a). He was sentenced to concurrent terms of two years' imprisonment on each count. The court of appeals affirmed.

1. Petitioner became the elected sheriff of Blount County, Tennessee, on September 1, 1986. Shortly after taking office, petitioner arranged a meeting with Jackson Sanford, the president of the East Tennessee Bonding Company, one of the five companies authorized at time to write bail bonds in Blount County. Sanford arrived at the meeting with an employee of his company. Although Sanford had supported petitioner's opponent in the election for sheriff, he offered petitioner a $1500 postelection campaign contribution. Petitioner then asked to speak privately with Sanford. After the employee left, petitioner accepted the $1500 contribution. According to Sanford's testimony, petitioner then advised Sanford that if he intended to write bonds in Blount County and if he wished to be considered the favored bonding company, he would have to pay petitioner $1000 per month. Sanford countered with an offer of $500 per month and they settled on $750 per month, payable quarterly. Sanford testified that petitioner was in a position to hurt his bonding company and that a previous sheriff "froze out" his business until he made the payoffs demanded by that sheriff. Sanford described his payments to petitioner as "protection money" that he paid so that his business would get a "fair shake." Pet. App. 2a-4a.

Sanford made nine payments to petitioner, totaling $19,500, between January 1987 and January 1989. Petitioner repeatedly cautioned Sanford not to disclose the payments to anyone or they would "go down" together. Sanford decided to stop the pay-

ments in March 1989. Petitioner told Sanford, "You'll be back soon, you'll come back . . . you can see me anytime you want to." On the day before petitioner's arrest, he told Sanford that both of them would be in the same trouble if Sanford revealed their arrangement. Pet. App. 5a-6a.

In January 1987, petitioner solicited payments from Quenton Stiles, one of the owners of the Blount County Bonding Company, a second bonding company that did business in the County. Petitioner arranged to talk with Stiles privately. He told Stiles that it had always been "customary to take care of the sheriff." As he said this, petitioner rubbed his fingers and thumb together. Stiles wanted no part of the payoff arrangement, but he was concerned that he would lose business if he did not pay. After considering his predicament, Stiles went to the authorities. Pet. App. 6a.

Beginning in April 1987, Stiles, in cooperation with the FBI, made monthly payments to petitioner through August 1987, and once again in February 1989, using currency furnished by the FBI. Tape recordings of their meetings showed that petitioner frequently commented about how petitioner had "done right" by Stiles and vice versa. Petitioner also commented that some other bondsmen, who had given petitioner trouble, were not doing well in the County. Pet. App. 7a.

2. With respect to the crime of extortion under color of official right, the jury was instructed in part as follows (Tr. 479-480; C.A. App. 563-564):

> Now, extortion under color of official right means the obtaining of property, including money, by a public official, by the misuse of his office, when the property obtained was not lawfully due and owing to him or to his office.

> Thus, extortion under color of official right does not require proof of specified acts by the public official demonstrating force, threats, intimidation or the use of fear so long as the person making payment consented to do so because of the office or position held by the official.
>
> Now, where the extortion is alleged to have been committed under color of official right, the government is not required to prove any overt inducement or solicitation of payment by the public official.
>
> In order to prove extortion under color of official right, rather than by wrongful use of fear, the government must prove, beyond a reasonable doubt, that payments were made to the public official with the reasonable expectation that the public official would extend some benefit or refrain from some harmful action, harmful action. It need not prove that benefits were actually extended.
>
> Additionally, the government must prove that the person making the payment held, and the defendant exploited, a reasonable belief and expectation that because of the defendant's public office, he had the ability to extend the benefit sought or prevent the harm feared.

The district court rejected an instruction sought by petitioner that the "inducement" required to prove a conviction "must either be in the form of a 'demand' or the communication of a custom or expectation, communicated by the nature of the defendant's prior conduct of office." C.A. App. 79.

3. The court of appeals affirmed petitioner's convictions. It rejected petitioner's contention that the jury should have been instructed that, in order to convict, it must conclude that unlawful payments were "induced" by explicit or implicit "demands" for payment by petitioner. The court of appeals agreed

with the majority view, concurred in by all but two circuits, that the Hobbs Act is violated by the public official's receipt of money not lawfully due him when the official knows that the motivation for the payment focuses on his public office. Pet. App. 10a-12a.[1]

ARGUMENT

Petitioner points out that in *Evans* v. *United States*, No. 90-6105 (argued Dec. 9, 1991), this Court should "resolve the precise issue Mr. Mills presents in the instant petition." Pet. 24. That is correct. The defendant in *Evans*, an elected county commissioner, was convicted of extortion under color of official right in violation of the Hobbs Act on the basis of his receipt of a payoff from a developer. In *Evans*, the Eleventh Circuit—like the court of appeals in this case and the majority of the other circuits—held that the government need not show, in a prosecution alleging extortion under color of official right, that the defendant induced a payoff by making a demand or a threat.[2] The meaning of "un-

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[1] Without discussion, the court of appeals also rejected as meritless petitioner's challenges to other aspects of the district court's definition of the Hobbs Act offense in the charge to the jury. Pet. App. 9a, 13a.

[2] See, *e.g.*, *United States* v. *Garner*, 837 F.2d 1404, 1423 (7th Cir. 1987), cert. denied, 486 U.S. 1035 (1988); *United States* v. *Spitler*, 800 F.2d 1267, 1274-1275 (4th Cir. 1986); *United States* v. *Jannotti*, 673 F.2d 578, 594-596 (3d Cir.) (en banc), cert. denied, 457 U.S. 1106 (1982); *United States* v. *French*, 628 F.2d 1069, 1074 (8th Cir.), cert. denied, 449 U.S. 956 (1980); *United States* v. *Williams*, 621 F.2d 123, 123-124 (5th Cir. 1980), cert. denied, 450 U.S. 919 (1981); *United States* v. *Butler*, 618 F.2d 411, 417-418 (6th Cir.), cert. denied, 447 U.S. 927 (1980); *United States* v. *Hall*, 536 F.2d 313, 320-321 (10th Cir.), cert. denied, 429 U.S. 919

der color of official right" and the nature of the "inducement" requirement, if any, are presented in the *Evans* case. Accordingly, the petition in this case should be held for *Evans*, and disposed of in light of the Court's decision in that case.

CONCLUSION

The petition for a writ of certiorari should be held and disposed of in light of this Court's decision in *Evans* v. *United States*, No. 90-6105.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

RICHARD A. FRIEDMAN
Attorney

DECEMBER 1991

(1976); *United States* v. *Hathaway*, 534 F.2d 386, 393-394 (1st Cir.), cert. denied, 429 U.S. 819 (1976). Two courts of appeals have taken the view that the government must show that the public official took some action to induce the transfer of property. See *United States* v. *Aguon*, 851 F.2d 1158 (9th Cir. 1988) (en banc); *United States* v. *O'Grady*, 742 F.2d 682 (2d Cir. 1984) (en banc).

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